

# CHILDREN & FAMILY LAW APPELLATE BULLETIN

Vol. 3, Issue 1

AUGUST 2000

What's inside?

APPELLATE PANEL "NETWORKING/SUPPORT" MEETINGS	p. 1
WHOM DO I CALL AT THE CHILDREN FAMILY LAW PROGRAM?	p. 2
CITATIONS TO THE RECORD	p. 2
TIPS FOR APPELLANTS	pp. 2-3
TIPS FOR APPELLEES	pp. 3-4
ORAL ARGUMENT	pp. 4-5
RECENT CHILD WELFARE DECISIONS	p. 4
FISCAL YEAR 2000 APPELLATE ASSIGNMENTS	p. 4
NEW ADDRESS	p. 5

## COMMITTEE FOR PUBLIC COUNSEL SERVICES

**Chief Counsel**  
William Leahy  
**Deputy Chief Counsel,**  
**Private Counsel Division**  
Patricia Wynn  
**Deputy Chief Counsel,**  
**Public Defender Division**  
Andrew Silverman

## CHILDREN & FAMILY LAW PROGRAM

**Co-Directors**  
R. Susan Dillard & Margaret Winchester  
**Training Director**  
Amy Karp  
**Staff Attorneys**  
Andrew Cohen & Julie Hall  
**Appellate Assignment &  
Certification Coordinator**  
Rita Caso  
**Administrative Support**  
Elissa Schaen & Tamika Jones

## APPELLATE PANEL "NETWORKING/SUPPORT" MEETINGS

Many Children & Family Law appellate panel members have expressed a desire to meet other panel members and establish an informal network of peers with whom to bounce around ideas. We have been holding meetings around the commonwealth in order to help introduce panel members to each other and address issues germane to appellate practice. We have already met with panel members in Suffolk, Hampden, Worcester and Essex counties. We have the following meetings remaining, and hope that everyone can attend one in his or her area:

Region	Location	Date	Time
Greater Boston	Edward Brook (New Chardon St) Courthouse, 3rd fl. Jury Pool Room	August 21	3-4:30
Southeast	Taunton Juv. Ct. (Courtroom)	August 30	3-4:30

At the meetings, we will distribute a list of all CAFL appellate attorneys and solicit your ideas for how we can better serve the needs of the appellate panel. If you have a case or question you would like us to discuss, please give us a call in advance of the meeting.

## WHOM DO I CALL AT THE CHILDREN & FAMILY LAW PROGRAM?

*For assistance with a case:*

Please direct any calls regarding strategic, research or informational assistance regarding a *parent* client (whether appellant or appellee) to Staff Attorney Julie Hall at (617) 988-8408 or Co-Director Margaret Winchester at (617) 988-8405. Please direct any such calls regarding a *child* client (again, whether appellant or appellee) to Staff Attorney Andrew Cohen at (617) 988-8310 or Co-Director Susan Dillard at (617) 988-8307.

*For assistance with an assignment:*

Please call us when you are ready for more work. If you are available for a new Children & Family Law appellate assignment, contact Andrew Cohen at (617) 988-8310. If for any reason you are unable to complete an assignment, please contact us immediately.

We will reassign the case provided this will not prejudice the client.

If you have questions regarding one of your assignments as appellate counsel, contact Rita Caso, Appellate Assignment Coordinator, at (617) 988-8444.

*When your appeal is completed:*

Please send copies of all briefs and FAR applications to Andrew Cohen. If the case closed without the need for you to file a brief, send us a letter explaining why the case was closed (e.g., settled, dismissed for failure to docket).



## CITATIONS TO THE RECORD

Rule 16(e) of the Massachusetts Rules of Appellate Procedure provides that “[n]o statement of a fact of the case shall be made in any part of the brief without an appropriate and accurate record reference.” The Rule requires that references to the evidence have record references in all sections of the brief: facts, procedural history, summary of the argument and argument. Failure to give record cites may be cause to strike that portion of the brief. Even if it leads to no formal action, failure to give record references may annoy the justices and make the clerks spend precious time searching the record for support for your factual assertions. It will also give your opponent the opportunity to respond with, “There is absolutely no support in the record for appellant’s assertion that...”

## TIPS FOR APPELLANTS

### Get a “Fresh” Affidavit of Indigence from Your Client Every Month.

The Appeals Court wants to see

Affidavits of Indigence (in support of a Motion to Waive Docketing Fee) that have been signed by parent appellants within thirty days. One way to avoid having only a “stale” affidavit (or no affidavit at all) upon receiving notice that the record has been assembled is to send a new affidavit to your client every thirty days. Don’t forget to explain the purpose of your monthly missive to your client to avoid confusion.

### Distinguish Between (a) Findings of Fact Not Supported by the Evidence, and (b) the Legal Conclusion of Unfitness Not Supported by the Findings.

Many appellant briefs fail to distinguish clearly between two different arguments, making the brief difficult to follow. The first argument is that the evidence does not support the findings of fact. The second is that the findings do not support a legal conclusion of parental unfitness by clear and convincing evidence. If you are making the first argument, make sure that you give references to the evidence in the record, not just to the trial court’s findings. It is very difficult for the Appeals Court to review whether the evidence supports the findings without detailed record citations to a witness’ testimony or to an exhibit. Also, if you are making the argument that the findings are not supported by the evidence, please don’t lose the forest for the trees. It benefits your client very little if you show that a particular finding lacks evidentiary support but you cannot mount a challenge to twenty-five other findings that convincingly show your client’s unfitness.

### Only Argue Issues That Are Adequately Preserved at the Trial Level.

In a recent 1:28 decision, Adoption of Shawn, 98-P-1130 (November 24, 1999), the mother and children argued on appeal that the decree dispensing with mother’s consent should be vacated because the children, both over the age of twelve, refused to be adopted. Section 2 of G.L. c. 210 requires the consent of any child above the age of twelve before the court may approve an adoption.

(Continued from page 2)

adoption.” The record was devoid of evidence of Shawn’s refusal to be adopted “except in the joint motion for a stay of the appeal and for leave of this court to file a motion for a new trial which simply states, without further support, that ‘[Shawn] refuses to give his consent to any adoption.’”(emphasis added). This could have been because the child changed his or her mind (see “Tips for Appellees - Challenging the Judgment” at pp. 3-4) or because trial counsel did not put in the evidence and did not present the issue to the trial court.

In its decisions, the Appeals Court commonly holds that issues not preserved on appeal will not be addressed. See, e.g., Adoption of Donald, 49 Mass. App. Ct. 908 (2000) (rescript). This is unfortunate, because such issues are frequently the most interesting issues briefed by appellants. Had these issues been preserved at the trial level, the case might have warranted oral argument and more substantial analysis by the panel.

Please be careful researching and arguing an issue if it is not preserved. The argument will likely be dismissed summarily. Do not assume that the Appeals Court will fail to discover that the issue was not preserved and address it along with the other issues. The justices and their clerks are adept at determining whether an issue was adequately preserved. On the other hand, if you have a good issue that was not preserved and you have questions on the various ways you might bring it before the Appeals Court (e.g., motion for new trial, motion for post-adoption visitation, subsequent appeals and consolidation), feel free to contact us to discuss it.

### **Raise Some Eyebrows.**

Most of the 1:28 decisions and briefs we read focus on five issues: the evidence does not support one or more of the findings, the findings do not support a conclusion of parental unfitness, certain evidence was admitted erroneously, the adoption plan is not in the child’s best interests, or the court failed to order post-adoption contact. Those issues may be all you have, but, unfortunately, they are almost never successful. In many cases the first three arguments do not win because, if there is error, it is found to be harmless. The last two arguments lose because no evidence was offered at trial about an alternative plan or the benefit of post-adoption visits for the child and thus, there is no record support for the argument on appeal. We encourage you to be creative with your arguments and raise new legal issues that the Appeals Court

does not usually see. The Appeals Court and SJC have recently granted oral argument to appeals featuring issues such as due process (insufficient notice), equal protection (conflict in treatment of litigants under c. 210 and c. 119), the limits of the juvenile and probate courts’ equitable powers, the right to counsel, the use of profile/syndrome evidence, and the creation of “legal orphans.” We are happy to help you spot and frame issues in your appeals.

## **TIPS FOR APPELLEES**

### **Reproduction of Trial Court Findings**

Rule 16(a)(6) of the Massachusetts Rules of Appellate Procedure requires the appellant to attach the findings of fact of the trial court as an addendum to the brief. We suggest that the appellee do so as well. After all, if you are citing to the trial court’s findings in your brief, why make the judge or clerk put down your brief and pick up the appellant’s brief in order to verify your point? The more the appellate court uses and relies on your brief, the better for your client.

### **Challenging the Judgment**

You are not permitted to challenge the judgment or seek a more favorable outcome if you have not filed a notice of appeal. See Boston Edison Co. v. Boston Redevelopment Authority, 374 Mass. 37, 43 n. 5 (1977); M.L. Shalloo, Inc. v. Ricciardi & Sons Construction, Inc., 348 Mass. 682, 684 (1965). If there is any aspect of the judgment your client wishes the appellate court to modify, you must file your own notice of appeal.

The need to file a late notice of appeal usually (but not always) arises in three contexts involving appellee-children: (1) your client changes his or her mind about being adopted during the pendency of the appeal; (2) your client is satisfied that he or she has been freed for adoption, but wants some form of post-adoption contact with parents or siblings that was not in the decree dispensing with consent; (3) a child client disagrees with the judgment but his trial

(Continued on page 4)

(Continued from page 3)

attorney failed to file a notice of appeal thinking he could simply “glom onto” the mother’s notice of appeal and be considered another appellant (the “Hey, *someone* filed an appeal, right?” approach). In any of these scenarios, chances are that, by the time the problem comes to light, you are beyond the 30-day period to file a notice of appeal under Mass. R. App. P. 4(a). Note that, under Rule 4(a), you get an additional fourteen (14) days to file a notice of appeal if another party has filed one in a timely fashion. Also, under Rule 4(c), the trial court may, upon a showing of excusable neglect, extend the appeal period an additional 30 days, whether or not the request to enlarge the time was filed within the initial 30 days. Under Mass. R. App. P. 14(b), a single justice of the Appeals Court may grant an enlargement of the period to file a notice of appeal up to one year after entry of the judgment. If you are beyond one year, then your client is probably out of luck. In any event, if you have been allowed to file a late notice of appeal, make sure that you make that fact clear in the procedural history section of your brief.

#### **Issues not Preserved on Appeal**

If an issue briefed by an appellant was not raised before the trial court, hammer that point home in your brief. It’s a winner almost every time.

### **RECENT CHILD WELFARE DECISIONS**

Some of the child welfare cases published during the end of 1999 and the first half of 2000 are listed below:

Adoption of Donald, 49 Mass. App. Ct. 908 (2000)(rescript) (due process, notice that a care and protection petition may result in a decree dispensing with consent; court’s power to dispense with consent sua sponte);

Adoption of Greta, 431 Mass. 577 (2000) (unfitness regarding failure to take antipsychotic medication; court’s authority to order post-adoption visitation);

Adoption of Lars, No. SJC-08011 (May 5, 2000) (affirming, without opinion, *Adoption of Lars*, 46 Mass. App. Ct. 30 (1998));

Adoption of Vito, 431 Mass. 550 (2000) (court’s authority to order post-adoption visitation);

Cobble v. Commissioner of Dep’t of Soc. Servs., 430 Mass. 385 (1999) (physical abuse; judicial deference to agency determination);

Care and Protection of Ivan, 48 Mass. App. Ct. 87 (1999) (home schooling; due process/parental educational rights; children in need of

care and protection as result of parents’ failure to provide information to school system);

Lawrence Savings Bank v. Garabedian, 49 Mass. App. Ct. 157 (2000) (enlargements of time to file brief).

The SJC in Vito and Greta affirmed that the probate court has equitable authority to order post-adoption contact between children and birth parents when such contact is in the children’s best interests, although in both cases the specific post-adoption contact orders were vacated for lack of evidentiary support. The SJC suggested that there are some limitations to the court’s authority to order such contact. Lars - also a post-adoption contact case - was affirmed by an evenly divided court without an opinion.

### **ORAL ARGUMENT**

No, it is not your imagination. Oral argument at the Appeals Court is becoming harder and harder to get. Please let us know if you get oral argument in your case. We like to attend each argument. We are also available to “moot court” your argument, in person or over the phone, if you would like to rehearse or just bounce ideas around.

Similarly, please let us know if your application for further appellate review is accepted by the Supreme Judicial Court. Under certain circumstances, the Committee for Public Counsel Services may be interested in filing an *amicus curiae* brief in your case.

### **FISCAL YEAR 2000 APPELLATE ASSIGNMENTS**

This past Fiscal Year the Children & Family Law Program issued approximately 205 new assignments for 95 appeals. We also had approximately 20 reassignments for attorneys who have left the practice, had conflicts of interest, or could not accept or continue with the appointment for one reason or another. The number of new assignments is somewhat lower than in previous

## **WE'VE MOVED!**



The Committee for Public Counsel  
Services has moved from 470 Atlantic  
Avenue. The Children & Family Law  
Program is now located at 44 Bromfield  
Street, Boston, MA 02108. All telephone  
and fax numbers remain the same.